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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 455

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, AND ABRAHAM S. PHILLIPS, EXECUTORS OF THE ESTATE OF I. L. PHILLIPS, DECEASED, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 18, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,377)

(35,377)

SUPREME COURT OF THE UNITED STATES

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vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings before U. S. Board of Tax Appeals	1	1
Docket entries	1	1
Amended petition	4	3
Deficiency letter	14	8
Amended answer	19	11
Findings of fact and opinion, Littleton, M	23	14
Decision	28	17
Petition for review	29	18
Notice of petition for review	36	21
Praecipe for record	38	22
Proceedings in United States circuit court of appeals, second circuit	40	23
Opinion, Swan, J	40	23
Judgment	48	28
Clerk's certificate	(omitted in printing)	50
Order allowing certiorari	51	29

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[fols. a & 1]

BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 19286

Estate of I. L. Phillips, Annie G. Phillips, Arthur L. Phillips, Seymour Phillips, and Abraham S. Phillips, as Executors,

vs.

Commissiondr of Internal Revenue

For Taxpayer: Herman Goldman, Esq.
For Commissioner: J. E. Mather, Esq., Mr. Littleton (Member).

Docket Entries

1926.
Aug. 14. Petition received and filed.
" 17. Copy of petition served on Solicitor.
" 14. Notification of receipt mailed taxpayer.
Oct. 4. Motion for extension to 12-3-26 to file answer—filed by Gen. Counsel.
" 12. Granted—Both sides notified.
Dec. 2. Answer filed by G. C.
" 29. Copy of answer served on taxpayer—Gen. Cal.
1927.
June 2. Motion to file amended petition filed by taxpayer, amendment tendered.
" 4. Granted—Both sides notified.
" 4. Copy of amended petition served on G. C.

[fol. 2]

Aug. 2. Answer to amended petition filed by G. C. Copy served 8-3-27.
1928.
Aug. 22. Hearing date set Oct. 2, 1928.
Sept. 21. Motion for a 30 day continuance filed by taxpayer.
" 26. Granted to Nov. 5, 1928.
Oct. 17. Motion to amend answer filed by G. C. Amendment tendered. Granted 10-19-28.
" 26. Stipulation of facts filed.

1928

Nov. 5. Hearing had before Mr. Littleton—taxpayer's brief due 30 days to be served—30 days for Commissioner to be served and 15 days for reply.

" 7. Transcript of hearing Nov. 5—filed.

" 27. Motion for extension to Dec. 31, 1928, to file brief filed by taxpayer. Granted.

Dec. 20. Brief filed by taxpayer. Copy served Dec. 21st.

1929.

Jan. 25. Brief filed by G. C.

Feb. 18. Motion for extension to March 24, 1929, to file reply brief, filed by taxpayer.

" 19. Order extending time to 3-5-29 to file reply brief entered.

Apr. 2. Findings of Fact and Opinion rendered Mr. Littleton—Judgment will be entered for the Commissioner.

" 3. Decision entered.

[fol. 3]

Oct. 1. Supersedeas bond in the amount of $18,612.72 approved and ordered filed.

" 1. Petition for review by U. S. Circuit Court of Appeals—2nd Circuit, with assignments of error filed by taxpayer.

" 2. Proof of service filed.

Nov. 25. Motion for extension to 12-31-29 to prepare and transmit record filed by taxpayer.

" 25. Præcipe filed—proof of service thereon.

" 26. Order enlarging time to Dec. 31, 1929, for preparation of evidence and transmission of record papers, entered.

Dec. 31. Order enlarging time to Jan. 15, 1930, for filing record entered.

Now, December 14, 1929, the foregoing docket entries certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 4] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDED PETITION

(b) The Executors of the Estate of the above named taxpayer, I. L. Phillips, Deceased, of 1225 Broadway, New York, N. Y., hereby appeal from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:E:RR BSP-60D) dated June 16th, 1926, and as the basis of its appeal sets forth the following:

(c) The deficiency letter (a copy of which is attached) was mailed to the taxpayer on the 16th day of June, 1926, and showed a deficiency in the amount of $9,306.36 on account of Federal Individual Income Taxes for the years 1918 and 1919, and the amount of taxes in controversy is less than $10,000.00, to-wit: the sum of $9,306.36.

[fol. 5] (d) The determination of tax contained in said deficiency letter is based upon the following errors:

(1) The Commissioner of Internal Revenue erred in disregarding the period of limitations upon assessment and collection of taxes, in proposing to assess against the taxpayer, I. L. Phillips, so-called additional corporation income and profits taxes of the Coombe Garment Company of Philadelphia of $9,124.68 for the year 1919 and $277.75 for the year 1918.

(2) That the Commissioner erred in computing the net income for the year 1919 of the Coombe Garment Company by not allowing as a deduction from net income, loss sustained on good will in the amount of $50,000.00.

(3) That the Commissioner of Internal Revenue has erred in determining that there are deficiencies for the years 1918 and 1919 against the petitioner, due and payable or collectible from him or his Estate or from the Executors of said Estate.

(e) The facts upon which the petitioner relies upon as the basis of this appeal are as follows:

1. The Treasury Department audited the Corporation Income and Profits Tax Returns of the Coombe Garment

Company, a corporation formerly located at 1046 S. 58th [fol. 6] Street, Philadelphia, Pa., and the Treasury Department in its letter to the taxpayer dated June 16, 1926, stated as follows:

"As provided in Section 280 of the Revenue Act of 1926, there is proposed for assessment against you, as a transferee of the assets of the Coombe Garment Company, dissolved, 1046 S. 58th Street, Philadelphia, Pa., the sum of $9,306.36, representing unpaid income and profits tax assessed against that company for the years 1918 and 1919, as detailed in the attached statement."

The right of the Commissioner to assess and collect additional taxes against the taxpayer, I. L. Phillips, expired.

The Commissioner of Internal Revenue is outlawed from making said assessment or collection of additional assessment on account of Corporation Income and Profits Taxes for the years 1918 and 1919 against the taxpayer, I. L. Phillips.

That no suit or proceeding for the collection of additional taxes of the Coombe Garment Company against I. L. Phillips was begun within five years after the date when the returns were due or made.

That no suit or proceeding for the collection of additional taxes was begun against the Coombe Garment Company within five years after the date when the returns were due or made.

[fol. 7] 2. That on March 1, 1913, the Coombe Garment Company had good will valued at least $50,000.00.

During the year 1919, the corporation disposed of its good will.

That there has not been allowed as a deduction from the net income of the Coombe Garment Company for the year 1919 loss sustained on good will in the amount of $50,000.00.

3. The Commissioner has proposed to assess the entire additional tax of Coombe Garment Company for the years 1918 and 1919 against I. L. Phillips.

I. L. Phillips was not the sole stockholder of the Coombe Garment Company at the time when the Coombe Garment Company liquidated.

The Coombe Garment Company at the time of liquidation had an issued capital stock of $50,000.00 and the following

is a list of the stockholders of the dissolved company showing their percentage of ownership therein:

B. C. Guildin	20%
I. L. Phillips	25
F. J. Noonan	5¼
C. S. Parmley	5¼
C. H. Parnell	2
Effie Scott	8¾
Max Phillips	13⅛
[fol. 8] I. A. Coombe	2⅝
H. F. Bushar	5
T. H. Coombe	5
R. R. Updegrave	6
Roy Updegrave	2

The Commissioner of Internal Revenue has erred in determining that there are deficiencies for the years 1918 and 1919 against the petitioner.

There are no unpaid tax liabilities which are due and payable by the Coombe Garment Company for the years 1918 and 1919.

The Commissioner of Internal Revenue is outlawed in collecting any additional taxes from the Coombe Garment Company for the years 1918 and 1919.

There are no unpaid tax liabilities which are due and payable by the petitioner for the years 1918 and 1919 which are due and payable.

The Commissioner of Internal Revenue is outlawed from collecting any taxes from the petitioner as "transferee" for the years 1918 and 1919.

Section 280 of the Revenue Act of 1926 is unconstitutional because of the following:

This section tries by retroactive provisions to make collectible taxes which were already outlawed for collection prior to the enactment of the Revenue Act of 1926. Deficiencies should be determined and assessed in accordance [fol. 9] with some reasonable rule of apportionment, and the exercise of a taxing power consists of two distinct processes, one being the imposition and assessment and the other collection. Section 280 merges the two steps in the process of taxation, loses the identity of collection in the tax and results in a direct tax against the transferee which

is levied without apportionment and not based on income and violates the Constitution of the United States. Section 280 deprives the transferee of his property without the due process of law.

The right to pursue assets in the hands of a third party for income tax of a transferor is lodged solely in a court of competent jurisdiction and not in the Commissioner of Internal Revenue.

Section 280 deprives the transferee, when assessed, of his legal and equitable rights and privileges in that it fails to permit the transferee to bring in any new parties or require the original taxpayer or debtor or other distributees from the original taxpayer to bear with him the burden of the defense, and to contribute their part to the common action.

Section 280 does not require the Commissioner of Internal Revenue to take all steps necessary to secure a possible collection of the tax from the transferor before first taking action against the transferee for the tax.

[fol. 10] Section 280 makes attempts to clothe the Commissioner of Internal Revenue, who is only an administrative officer with judicial powers.

Section 280 does not give the transferee the power to ascertain whether or not the taxes sought to be collected are even due from the transferor.

Section 280 places the burden of proof upon the transferee in proving the tax, if any, be due of the "taxpayer".

Section 280 of the Revenue Act of 1926 deprives a petitioner of his right of a trial by jury.

It is public knowledge that the Commissioner of Internal Revenue by determining a deficiency against the transferee does so on the theory that the assets of a corporation are a trust fund for the benefit of creditors. The right to determine a deficiency against the transferee and to collect same is not lodged in the hands of the Commissioner of Internal Revenue but is lodged solely in a court of competent jurisdiction.

An appeal allowed by the statute under the law to the United States Board of Tax Appeals does not afford the taxpayer "due process" for the reason among many others that an appeal to the United States Board of Tax Appeals requires the payment of a filing fee before contesting the tax and also places the burden of proof upon the transferee

[fol. 11] in overthrowing the findings of the Commissioner and compels the transferee to initiate the proceedings at his own expense; grants no right to the transferee to make anyone but the Commissioner of Internal Revenue a party to the proceedings before the United States Board of Tax Appeals.

Section 280 is indefinite and uncertain for the reason that those who deal in the exchange of or other method of dealing in property cannot determine their obligations under the revenue law simultaneously with the transaction. The revenue act of 1926 of which Section 280 is a part undertakes in no way to determine the measure of the liability of the transferee of property of a taxpayer for the tax primarily due by the taxpayer nor does it lay down any rule by which it may be determined. The law attempts to authorize the Commissioner of Internal Revenue to assess the liability at law or in equity of the transferee of property of a taxpayer. However, before the assessment can be made, the liability must be determined. The law is silent as to who shall fix the liability at law or in equity.

An appeal to the United States Board of Tax Appeals does not confer "due process" for the reason that the Board is not a court because the members are not appointed for life.

The right to appeal from the Board of Tax Appeals to the [fol. 12] United States Circuit Court of Appeals is for review of errors of law and not of fact. No new evidence can be introduced before the United States Board of Tax Appeals. Therefore, there is no judicial determination of the liability of the transferee by the United States Board of Tax Appeals.

The obligation, if any, of a transferee is a debt founded upon contract, expressed or implied, rather than a tax and a debt cannot be assessed and collected by a ministerial officer through the application and determination by him of legal and equitable principles.

The "transferee" reserves all rights to urge any and all other grounds and reasons in connection with this petition.

(f) Wherefore, the taxpayer prays that this Board hear the proceding and grant it relief as follows:

1. That the Commissioner of Internal Revenue be not permitted to assess the proposed additional taxes or issue any

warant or lien or bring any suit or proceeding for the collection of said tax against the taxpayer.

U. S. of America vs. Godfrey L. Cabot, Supreme Court of the District of Columbia, decided June 15, 1926.

New York & Albany Lighterage Company vs. Bowers, So. District of New York, decided February 13, 1925.

[fol. 13] 2. That there be allowed in the computation of the net income of the Coombe Garment Co. for the year 1919 a deduction of $50,000 representing March 1, 1913, valuation of good will.

3. That the deficiencies determined by the Commissioner of Internal Revenue for the years 1918 and 1919 be disallowed, cancelled and eliminated because Section 280 is unconstitutional in accordance with the decision rendered in the case of Owensboro Ditcher & Grader Company v. Lucas, U. S. District Court, Western District of Kentucky, decided April 16, 1927.

Arthur Rothstein, Counsel for the Petitioner, 120 Broadway, New York, N. Y.

—Duly sworn to by Seymour Phillips. Jurat omitted in printing.

[fol. 14] Treasury Department, Washington, Office of Commissioner of Internal Revenue

IT:E:RR. BSP-60D

Mr. I. L. Phillips, 1225 Broadway, New York, N. Y.:

As provided in Section 280 of the Revenue Act of 1926, there is proposed for assessment against you, as a transferee of the assets of the Coombe Garment Company, dissolved, 1046 S. 58th Street, Philadelphia, Pa., the sum of $9,306.36, representing unpaid income and profits tax assessed against that Company for the years 1918 and 1919, as detailed in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the

[fol. 15] redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7; in the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by ——.

——, Assistant to the Commissioner.

Enclosures: Statement, Waiver—Form A.

[fol. 16] IT:CA-2228-6.

April 8, 1924.

Coombe Garment Company, Minersville, Penna.

Sirs: Reference is made to your brief dated February 26, 1924, in which protest is made against the proposed additional assessment in the amount of $562.23, as outlined in office letter dated February 4, 1924, and to your application for assessment under Sections 327 and 328 of the Revenue Act of 1918.

Before consideration can be given your application there must be a final determination of your net income and invested capital for the year 1918. Therefore, it will be necessary for you to advise this office within twenty days from the date of this letter of your acquiescence in the following determination of your net income and invested capital, or exceptions, if any, which you may take thereto:

1918 additional tax $277.75

Computation of Net Income

Net income as shown by examining officer	$20,530.15
Less additional depreciation allowed	345.25
Corrected net income	$20,184.90
Invested capital as shown by examining officer	29,111.27
[fol. 17] Excess profits credit	5,325.90
War profits credit	5,911.13
Excess profits tax computed under Section 302	$5,247.92
Tax at 12% rate	1,552.44
Total tax assessable	$6,800.36
Tax previously assessed	6,522.61
Additional tax due	$277.75

Inasmuch as your corporation has been liquidated, the deficiency in tax has been assessed without giving the usual time allowed under Section 274(a) of the Revenue Act of 1924.

fk-7.

In re Coombe Garment Company, 1046 South 58th Street, Philadelphia, Pennsylvania

1919

Deficiency in tax		$9,124.68
Net income as reported by Revenue Agent		$28,925.80
Add increase in profits on sale of assets due to allowing additional depreciation in 1918		345.25
Adjusted net income		29,271.05

The profits tax has been computed under Section 302 as follows:

[fol. 18] Net income	$20,000.00	
Less Exemption	3,000.00	
Taxable at 20%	$17,000.00	$3,400.00

Balance of net income taxable at 40%	9,271.05	
		3,708.42
Total profits tax		$7,108.42
Net income	$29,271.00	
Less:		
Profits tax $7,108.42		
Exemption 2,000.00		
	9,108.42	
Balance subject to tax at 10%	$20,162.58	
Amount of tax at 10%		2,016.26
Total tax assessable		$9,124.68
Previously assessed		None
Deficiency in tax		$9,124.68

It is important that reference be made in your reply to IT:CA:-2228-8-App.

Respectfully, J. G. Bright, Deputy Commissioner, by (Signed) F. R. Quin, Head of Division.

Now, December 14, 1929, the foregoing amended petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 19] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDED ANSWER—Filed Oct. 17, 1928

Comes now the Commissioner of Internal Revenue, by and through his Attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue and for his Amended Answer to the Amended Petition filed herein admits, denies and alleges:

B. Admits the allegations contained in Paragraph B of the Amended Petition.

C. Admits that the taxes in controversy are the Federal Income and profits taxes of the Coombe Garment Company for the years 1918 and 1919 in the amount of $9,306.36.

D. Denies each and every allegation of error contained in Paragraph D of the Amended Petition.

[fol. 20] E (1). Admits that the Commissioner proposed for assessment against petitioner the unpaid income and profits taxes assessed against the Coombe Garment Company for the years 1918 and 1919, and alleges that the said proposal and notice of deficiency was mailed to petitioner within the time required by law.

E (3). Admits that at the time of the liquidation of the Coombe Garment Company this petitioner was one of the stockholders of said company.

G. Denies each and every other allegation, matter, and thing in said Amended Petition contained.

Respondent further answering, alleges:

H. That during all the times material herein the Coombe Garment Company was a corporation organized and existing under the Laws of the State of Pennsylvania.

I. That on June 17, 1919, said corporation filed its income and profits tax return on Form 1120 for the calendar year 1918 with the Collector of Internal Revenue, First District of Massachusetts, disclosing a tax of $6,522.61.

That on February 9, 1924, said corporation filed a waiver, Form 1435 M, extending the statutory period of limitation for the determination, assessment, and collection of the amount of income and excess profits or war profits taxes due under any return made by or on behalf of said Coombe Garment Company for the year 1918 for a period of one year.

[fol. 21] That on or about March 6, 1920, said corporation filed its income and profits tax return on Form 1120 for the calendar year 1919 with said Collector.

J. That in February, 1925, and within the statutory period extended by said waiver, the Commissioner of Internal Revenue assessed against said corporation additional income and excess profits taxes for the year 1918 in the sum of $277.75, appearing on the February, 1925, Commissioner's List, Page 1, Line 2, $96.07 of said assess-

ment having been paid under date of July 3, 1925, leaving a balance of $181.60 oustanding; that in December, 1924, and within the time prescribed by law, the Commissioner of Internal Revenue assessed against said corporation additional income and excess profits taxes for the year 1919 in the sum of $9,124.68, appearing on the December, 1924, List, Special #8, Page 0, Line 0.

That there is assessed, outstanding, and unpaid income and excess profits taxes of said corporation for the years 1918 and 1919 in the amount of $9,306.36; that said corporation was duly notified of the aforesaid taxes and payment thereof duly demanded.

K. That on or about September 27, 1919, said corporation discontinued its business and was thereafter dissolved by voluntary act of its stockholders.

That said corporation, after paying certain corporate indebtedness, distributed all of its assets to its then stock-[fol. 22] holders; that this petitioner as one of such stockholders received in such distribution so made by said corporation assets and property largely in excess of the taxes and interest involved in this appeal.

That such distribution so made to such stockholders, and particularly this petitioner, was voluntary and without consideration and that, by reason thereof respondent has been and still is unable to collect said taxes from said Coombe Garment Company.

Wherefore respondent prays that the Com-sioner's determination that petitioner is liable herein as a transferee of the assets of the Coombe Garment Company within the purview of Section 280 and for the amount of taxes with interest involved in this appeal, be in all things approved.

C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: J. H. Mather, Jeff T. Jones, Special Attorneys, Bureau of Internal Revenue.

JTJ/tcl. 10/17/28.

Now, December 14, 1929, the foregoing Amended Answer certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 23] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19286

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, and Abraham S. Phillips, Executors of the Estate of I. L. Phillips, Deceased, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

FINDINGS OF FACT AND OPINION—Promulgated April 2, 1929

Under Section 280 of the Revenue Act of 1926 one of eleven transferees of the assets of the corporation upon liquidation who received property of a great value than the deficiency in income and profits tax due by the corporation, is liable for payment of the entire deficiency.

Herman Goldman, Esq., for the Petitioner.
J. E. Mather, Esq., for the Respondent.

The Commissioner determined and assessed deficiencies in income and profits tax against the Coombe Garment Company of $277.75 for 1918 and $9,124.68 for 1919, and on June 16, 1926, mailed a notice to I. L. Phillips, a transferee, [fol. 24] proposing therein to assess against and collect from him the amount of additional unpaid taxes for the years in question assessed against the Coombe Garment Company.

The facts are stipulated.

Findings of Fact

The executors are residents of New York, N. Y. The Coombe Garment Company, Inc., and the Coombe Garment Company are one and the same; a Pennsylvania corporation, which had its principal place of business in Philadelphia, Pa. The corporation filed its corporation income and profits tax return for the calendar year 1918 on June 16, 1919, and its return for the year 1919 on March 6, 1920. At the time of complete liquidation, September 27, 1919, the corporation had issued and outstanding capital stock of

$50,000, represented by 500 shares of a par value of $100 each. The stockholders, the number of shares owned by each and the percentage of capital stock owned by each to the total capital stock outstanding of the Coombe Garment Company, and the amount received by each stockholder as liquidating dividends, were as follows:

Name of stockholder	Percentage of stockholdings	Amount received in liquidation
B. C. Guldin	180/0003/900	$13,711.69
I. L. Phillips	225/0003/900	17,139.61
F. J. Noonan	47/3690/900	3,608.38
C. S. Parmley	47/3690/900	3,608.38
[fol. 25] C. H. Parnell	18/0003/900	1,371.19
Effie E. Scott	78/1600/900	9,953.90
Max Phillips	118/4182/900	9,020.61
L. A. Coombe	23/6823/900	1,804.02
W. H. Coombe	45/0002/900	3,427.94
R. R. Updegrave	81/0002/900	6,170.27
Roy Updegrave	36/0002/900	2,742.36
		$68,558.35

The amount of $68,558.35 shown above as paid in liquidating dividends was the total assets of the Coombe Garment Company and was paid by said corporation to its stockholders between July 25, 1919 and September 27, 1919.

The Commissioner assessed against the corporation an additional tax of $277.75 for 1918 in February, 1925, and an additional tax of $9,124.68 for 1919 in December, 1924.

$96.07 of additional tax assessed against the corporation for 1918 has been paid, leaving $9,306.36 unpaid tax due upon the income of the corporation for the years involved. No suit or proceedings for collection of said additional assessments against the Coombe Garment Company have been begun, made, or instituted.

June 16, 1926, the Commissioner mailed to I. L. Phillips, at 1225 Broadway, New York, N. Y., a notice of his determination of petitioner's liability for the unpaid tax of the corporation as follows:

[fol. 26] As provided in Section 280 of the Revenue Act of 1926, there is proposed for assessment against you, as a

transferee of the assets of the Coombe Garment Company, dissolved, 1046 South 58th Street, Philadelphia, Pennsylvania, the sum of $9,306.36, representing unpaid income and profits tax assessed against that company for the years 1918 and 1919, as detailed in the attached statement.

The Commissioner is proposing by the aforesaid notice to assess and collect from I. L. Phillips the entire additional tax of the Coombe Garment Company and has not sent to any other stockholder, as transferee of the assets of the Coombe Garment Company, a notice on account of the unpaid deficiencies for the years 1918 and 1919 of the Coombe Garment Company.

February 9, 1924, the Coombe Garment Company and the Commissioner consented in writing to the extension of the statutory period of limitation for the determination, assessment and collection of the amount of income and excess-profits or war-profits taxes due under any return made by or on behalf of said Coombe Garment Company for the year 1918, for a period of one year.

I. L. Phillips has not entered into any agreement with the Commissioner with regard to the time within which any amounts on account of the taxes of the corporation for 1918 and 1919 may be assessed and/or collected against him.

There is no suit or proceeding pending against any of the other stockholders of the Coombe Garment Company for [fol. 27] collection of all or any part of the additional taxes of the Coombe Garment Company for the years 1918 and 1919 above referred to.

Opinion

LITTLETON: The executors contend (1) that Section 280 of the Revenue Act of 1926 is unconstitutional, and (2) if the section is constitutional, the estate of I. L. Phillips is liable for only its pro rata portion of the unpaid tax of the corporation.

The first contention is disposed of by the opinion of the Board in Henry Cappellini, et al., 14 B. T. A. 1269, and the second claim advanced is governed by the opinion of the Board in Grand Rapids National Bank, 15 B. T. A. —, promulgated March 29, 1929, in which we held that any one of several transferees of the assets of the corporation is

liable for the unpaid tax of the corporation to the extent of the amount received upon liquidation. Since I. L. Phillips received property of a greater value than the amount of the tax due by the Coombe Garment Company, the taxpayer, the Commissioner's determination is approved.

Judgment will be entered for the respondent.

Now, December 14, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 28] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 19286

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, and Abraham S. Phillips, Executors of the Estate of I. L. Phillips, Deceased, Petitioners,

v

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the Board's findings of fact and opinion, promulgated April 2, 1929, it is

Ordered and decided: That there are deficiencies of $277.75 and $9,124.68 for the years 1918 and 1919, respectively.

(Signed) B. H. Littleton, Member United States Board of Tax Appeals.

Enter.

Entered Apr. 3, 1929.

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

[fol. 29] Now, December 14, 1929, the foregoing decision certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PETITION FOR REVIEW—Filed Oct. 1, 1929

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Come now Annie G. Phillips, Arthur L. Phillips, Seymour Phillips and Abraham S. Phillips, as Executors of [fol. 30] the Estate of I. L. Phillips, deceased by their attorney, and bring this petition for a review by the United States Circuit Court of Appeals for the Second Circuit of the judgment and order of redetermination of the deficiency tax rendered and entered by the United States Board of Tax Appeals on April 3d, 1929, and for a review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board of Tax Appeals adverse to the petitioners and upon which the said judgment and order were made and promulgated April 3d, 1929, and for their said petition respectfully show:

First. The petitioners reside in the Borough of Manhattan, City and State of New York, and are within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

Second. The controversy herein involved arises out of the determination by the Commissioner of Internal Revenue that the petitioners' decedent, as transferee of a portion of the assets of the Coombe Garment Company, was liable for the payment of deficiencies in the income and profits tax determined and assessed against the said Coombe Garment Company for the years 1918 and 1919.

The facts involved in this controversy are as follows:

(1) The Coombe Garment Company was a corporation duly organized under the laws of the Commonwealth of [fol. 31] Pennsylvania on May 2nd, 1902, and had its principal office and place of business at Philadelphia, Pennsylvania.

(2) The Coombe Garment Company filed its corporation income and profits tax return for the calendar year 1918

on June 16th, 1919, and the corresponding return for the year 1919 on March 6th, 1920.

(3) In September, 1919, the said Coombe Garment Company dissolved; at the date of final liquidation and dissolution the corporation had issued and outstanding capital stock of $50,000 represented by 500 shares of a par value of $100 each. The petitioners' decedent was one of the eleven stockholders of the said Coombe Garment Company and received upon the dissolution of the corporation as his pro rata share of its assets totaling $68,558.35, the sum of $17,139.61.

(4) The Commissioner assessed against the Coombe Garment Company an additional tax of $277.75 for the year 1918 in February, 1925, and an additional tax of $9,124.68 for the year 1919 in December, 1924. There was previously paid the sum of $96.07 of the tax assessed for the year 1918, leaving a total unpaid deficiency tax of $9,306.36 allegedly due by the said Coombe Garment Company for the years involved.

(5) On June 16th, 1926, the Commissioner mailed to the petitioners' decedent at 1225 Broadway, New York City, a notice of his determination of the decedent's liability for [fol. 32] the total unpaid deficiency tax of the Coombe Garment Company.

(6) The Commissioner in sending to the decedent notice of his determination, was seeking to collect the entire additional deficiency tax from the said decedent and is now seeking to collect the said deficiency tax from the petitioners as the executors of the decedent's estate and has not sent to any other former stockholder as transferee of the assets of the Coombe Garment Company a notice on account of the unpaid deficiency tax for the years 1918 and 1919.

(7) The petitioners appealed to the United States Board of Tax Appeals from the said determination of the Commissioner; the Board of Tax Appeals affirmed the determination of the Commissioner and entered judgment accordingly.

(8) The petitioners are petitioning the review of the said decision, judgment and order of redetermination of the

United States Board of Tax Appeals pursuant to the provisions of Section 1001-A of the Revenue Act of 1926, feeling that they have been greatly aggrieved by the said decision of the Board of Tax Appeals.

Third. The petitioners respectfully allege that manifest error has been committed by the United States Board of Tax Appeals in the rendering of the aforesaid judgment and decision, to wit:

[fol. 33] (1) The Board erred as a matter of law in not finding that Sectional 280 of the Revene Act of 1926 is unconstitutional.

(2) The Board erred as a matter of law in deciding that the petitioners were estopped from questioning the constitutionality of Section 280 of the Revenue Act of 1926.

(3) The Board erred as a matter of law in not finding that the Commissioner of Internal Revenue did not have the power to determine the decedent's liability for the deficiency tax of the Coombe Garment Company for the year 1918.

(4) The Board erred as a matter of law in not finding that the Commissioner of Internal Revenue did not have the power to determine the decedent's liability for the deficiency tax of the Coombe Garment Company for the year 1919.

(5) The Board erred as a matter of law in not finding that the petitioners had the right to have their liability as executors of the estate of the decedent, an alleged transferee of the assets of the Coombe Garment Company, determined according to the equitable principles enunciated and laid down by the courts of equity of the United States.

(6) The Board erred in determining that the petitioners were liable for the total deficiency tax of the Coombe Garment Company for the year 1918.

[fol. 34] (7) The Board erred in determining that the petitioners were liable for the total deficiency tax of the Coombe Garment Company for the year 1919.

(8) The Board erred as a matter of law in not finding that the collection of the deficiency tax from the transferees of

the assets of the Coombe Garment Company could only be accomplished by the joinder of all of the said transferees as parties defendant in an action in a court of equity.

(9) The Board erred in determining the liability of the petitioners to be greater than an amount equal to that portion of the total deficiency tax which the number of shares of the Coombe Garment Company owned by the decedent bears to the total number of shares of stock of the corporation issued and outstanding at the time of distribution and dissolution.

Wherefore your petitioners pray that this petition for a review by the United States Circuit Court of Appeals for the Second Circuit, of the decision, judgment and order of redetermination of the United States Board of Tax Appeals, be granted.

Dated New York, Sept. 24th, 1929.

Seymour Phillips, Petitioner.

[fol. 35] *Duly sworn to by Seymour Phillips. Jurat omitted in printing.*

[fol. 36] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF PETITION FOR REVIEW—Filed Oct. 2, 1929

To C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue, Attorney for Respondent:

Please take notice that on the 30th day of September, 1929, a petition was filed with the United States Board of Tax Appeals for a review of the decision of said Board in the above-entitled cause by the United States Circuit Court of Appeals for the Second Circuit, a copy of which said petition for review is herewith served upon you.

Herman Goldman, 120 Broadway, New York, New York, Attorney for Petitioners.

[fol. 37] Service of the foregoing notice and service of a copy of the petition for review mentioned in said notice is acknowledged this 30th day of September, 1929.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

Now, December 14, 1929, the foregoing petition for review, notice of filing and proof of service certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 38] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE FOR RECORD—Filed Nov. 25, 1929

To the Clerk of the Board of Tax Appeals:

You will please prepare within sixty days from the date of the filing of the Petition for Review in the above entitled case and transmit to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, certified copies of the following documents:

1. The docket entries of proceedings before the Board.
2. Pleadings before the Board (amended petition and amended answer).
3. Findings of fact, opinion and decision of the Board.
4. Petition for Review.

[fol. 39] The foregoing are to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Herman Goldman, Attorney for Petitioners. Office & P. O. Address: 120 Broadway, Borough of Manhattan, City and State of New York.

To C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue.

Service of the within præcipe accepted this 22nd day of November, 1929.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

Now, December 14, 1929, the foregoing præcipe certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ANNIE G. PHILLIPS et al., as Executors of the Estate of I. L. Phillips, Deceased, Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Appeal from an Order of the United States Board of Tax Appeals

OPINION

This proceeding involves deficiencies in income and profit taxes for the years 1918 and 1919, which the Commissioner of Internal Revenue assessed against a dissolved corporation and proposes to assess against a former stockholder of said corporation, who received on distribution of the corporate assets liquidating dividends larger than the amount of said deficiency taxes. The proposed assessment having been confirmed by an order of the Board of Tax Appeals, the executors of said stockholder, deceased, have petitioned for review. Affirmed.

The findings of fact and opinion of the Board appear in 15 B. T. A. 1218. The facts were stipulated. In September, 1919, Coombe Garment Company, a Pennsylvania corporation, was dissolved, and all its property was distributed among its eleven stockholders in proportion to [fol. 41] their respective holdings. Prior thereto the corporation had filed its returns and paid the taxes therein indicated for the calendar years 1918 and 1919. Subsequently a deficiency tax for each of said years was assessed against the corporation, and on June 16, 1926, the Commissioner notified I. L. Phillips, a former stockholder, that he proposed to assess against him as a "transferee" the entire amount of said deficiency taxes, pursuant to the provisions of section 280 of the Revenue Act of 1926 (44 Stat. 61; 26 U. S. C. A. sec. 1069). Said Phillips had received as liquidating dividends more than the amount of said taxes. No proceeding was initiated by the Commis-

sioner to assess or collect from any other stockholder. The executors of the estate of I. L. Phillips, deceased, petitioned the Board of Tax Appeals for a redetermination, but the Board confirmed the Commissioner's action.

Herman Goldman, for Appellants; Milton J. Levitt and Arthur Rothstein, of Counsel.

G. A. Youngquist, Assistant Attorney General, for Respondents; Sewall Key, John Vaughan Groner, Special Assistants to the Attorney General; C. M. Charest, General Counsel, Bureau of Internal Revenue; Allin H. Pierce, Special Attorney, Bureau of Internal Revenue, of Counsel.

SWAN, Circuit Judge:

The appellants first challenge the constitutionality of section 280 of the Revenue Act of 1926; and secondly assert, that even if it be constitutional, their liability is only for a [fol. 42] pro rata share of the corporation's unpaid taxes.

Before passing to a consideration of these primary contentions it is necessary to dispose of a jurisdictional question, although not urged by the appellee. That question is whether a "transferee" is given the same right of judicial review of the Board's decision as is a "taxpayer". The statute provides for review by the court upon petition filed by "either the commissioner or the taxpayer" (26 U. S. C. A. sec. 1224); and it may be argued that by the language of section 280 Congress has differentiated between taxpayers and transferees by referring to the liability of the latter as "the liability, at law or in equity of a transferee of property of a taxpayer, in respect of the tax • • • imposed upon the taxpayer." But section 280 directs that the liability of the transferee shall be "assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title",—language which indicates, in our opinion, a clear intention to give to a transferee the same right as a taxpayer in respect to seeking a review of a proposed assessment by appeal to the Board of Tax Appeals and to the court. The precise point now under consideration was discussed in Routzahn v. Tyroler, 36 F. (2d) 208 (C. C. A. 6), and we agree with the view there expressed that the statutory definition of "taxpayer" (26 U. S. C. A. sec. 1262) is not seriously inaccurate as

applied to a transferee. This view finds added support in the language of the Supreme Court in United States v. Updike, decided May 19, 1930, where Mr. Justice Sutherland said:

[fol. 43] "Indeed, when used to connote payment of a tax, it puts no undue strain upon the word 'taxpayer' to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax."

We conclude, therefore, that the appellants are rightfully here.

The constitutionality of section 280 is attacked upon the ground (1) that it confers judicial powers upon an administrative officer, and (2) deprives the transferee of his property without due process of law in violation of the Fifth Amendment. There is not lacking judicial authority in support of these contentions. Owensboro &c. Co. v. Lucas, 18 F. (2d) 798 (D. C. W. D. Ky.); Mid-Continent Petroleum Corp. v. Alexander, 35 F. (2d) 43 (D. C. W. D. Okla.); cf. Felland v. Wilkinson, 33 F. (2d) 961, 962 (D. C. W. D. Wis.). But see Routzahn v. Tyroler, supra. See also "The Constitutionality of the Transferee Provisions of the Revenue Acts", 29 Columbia L. Rev. 1052. In our opinion the section is valid. Due process is afforded because a hearing is provided before this court in the event of dissatisfaction with the determination of the Board of Tax Appeals, to say nothing of the alternative remedy of an action to recover the tax after payment. Nor is judicial power improperly delegated. That the collection of taxes by summary process is a remedy which antedates the Constitution and does not violate its provisions as to the separation of powers, is a doctrine too well established to require the citation of authorities. Nor is such summary procedure confined to the [fol. 44] collection of taxes qua taxes. It extends to collection of a debt due the government from a defaulting collector of customs and his sureties. Murray's Lessee v. Hoboken Land &c. Co., 18 How. 272. Within the principles ably discussed by Mr. Justice Curtis in that case, we think the procedure provided by section 280 is sustainable. That section, as said by the Supreme Court in United States v.

Updike, supra, "prescribes a mode of procedure against transferees of the property of a taxpayer". There is every reason for having the preliminary steps administrative and summary because that is the only efficient method of collecting promptly the tax due from the transferor, when he has made direct collection impossible by transferring his property. Enforcement of the transferee's liability by court process had been found ineffective to prevent loss of revenue and tax evasion. So Congress provided a new and summary procedure. See House Rep. No. 2, 70th Cong., pp. 31-32. That the obligation of the transferee is not directly and primarily to pay his own tax, but is based upon his "liability at law or in equity" to pay the tax of another should make no difference, in our opinion, in the validity of the procedure Congress has provided for collection. The Commissioner's determination of the transferee's liability, and the extent of it, is not different in kind from the auditing of the amount due from the defaulting collector in Murray's lessee. That which is paid results in the end in the collection of a tax, though from the transferee rather than from the person originally liable. It is a method of [fol. 45] collecting revenue; and, though summary, it does not operate so harshly upon the transferee, in view of the recourse he may have to the courts to correct administrative errors, as to fall outside the pale of permissible legislation.

Having determined that the section is constitutional, it becomes unnecessary for us to consider the Commissioner's contention that by availing of its provisions in seeking a redetermination by the Board of Tax Appeals, the appellants are estopped from questioning its constitutionality—a doctrine which was accepted in Cappellini v. Commissioner, 14 B. T. A. 1269, and followed by the Board in the decision now under review, but disapproved in Routzahn v. Tyroler, supra.

There remains the question of the extent of the appellants' liability. They contend that it is limited to their decedent's pro rata share of the corporation's tax, while the Commissioner contends that each stockholder is severally liable up to the amount of the liquidating dividend he received. The Commissioner's contention is correct. Bartlett v. Drew, 57 N. Y. 587, is precisely in point. This was an action in the nature of a creditor's bill brought by a judg-

ment creditor of a New Jersey corporation, after the return of an execution unsatisfied, to reach money distributed by the corporation to Drew, a large stockholder and a resident of New York. Drew contended that the suit could not be maintained against him alone, but all stockholders must be brought in to the end that each might contribute his proportion to the payment of the plaintiff's debt. The court rejected this contention, saying:

[fol. 46] "* * * It is a very plain proposition that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and its creditors have a lien and the right to priority of payment over any stockholder. (2 Story Eq. Jur., sec. 1252.) Where stock and property has been divided between stockholders before all the debts of the corporation have been discharged, if any one stockholder is compelled to pay more than his fair share of any unpaid debt he may resort to his associates for equitable contribution; but with that proceeding the creditor has nothing to do, unless he chooses to intervene to settle equities that may exist between his debtors" (page 589).

* * * * * * *

"* * * The defendant, Drew, is found to be in possession of the assets of the dissolved or insolvent corporation more than sufficient to pay the plaintiff her demand, and the law requires that he should pay it" (page 591).

This case was followed in Hastings v. Drew, 76 N. Y. 9, and Singer v. Hutchinson, 183 Ill. 606. See also, Kimbrough v. Davies, 104 Miss. 722; Williams v. Commercial Nat. Bank, 49 Ore. 492; Fletcher, Corporations, sec. 5060 and sec. 4127, where it is said that the weight of authority is in accord. The Bartlett case was cited with approval in Hatch v. Dana, 101 U. S. 205, 212, which allowed recovery by a creditor from a single stockholder of the latter's unpaid stock subscription, for which no call had been made by the corporation, against defendant's objection that all stockholders should be joined.

It is true that by cross bill the stockholder who is sued may bring in other stockholders and obtain contribution. Fletcher, id. sec. 4102. This is a matter of procedure to

avoid a multiplicity of suits and do complete justice between all the parties concerned. But the extent of the defendant's liability to the creditor is not diminished by the fact that defendant may have a right of contribution, which, for convenience, may be enforced in the creditor's [fols. 47 & 47½] suit rather than in an independent action. This is demonstrated beyond question, to our minds, by appellants' concession that if other stockholders are insolvent or beyond the jurisdiction, the creditor need not pursue them and the liability of stockholders who are parties will be correspondingly increased beyond their pro rata shares of the creditor's claim. The liability of one who receives corporate assets impressed with a trust for payment of corporate debts, extends to the full value of such assets. That there may be rights of contribution if those assets are taken from him does not diminish his liability, nor concern the creditor. See Hatch v. Dana, 101 U. S. 205, 214; Marsh v. Burroughs, 1 Woods 463, 468. If United States v. Armstrong, 26 F. (2d) 227 (C. C. A. 8), can be thought contrary to this conclusion, we cannot yield to it.

Section 208 of the Revenue Act of 1926 permits the Commissioner to collect from a transferee according to his "liability" and without regard to rights of contribution he may have against others. With such rights the government is not concerned in its collection of revenue. They are not affected by the Commissioner's action and may be prosecuted in the proper forum. The order of the Board is affirmed.

[fol. 48] In United States Circuit Court of Appeals, Second Circuit

Annie G. Phillips et al., as Executors, etc., Petitioners,

v.

Commissioner of Internal Revenue, Respondent

Appeal from the United States Board of Tax Appeals

Judgment—Filed June 16, 1930

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 49] [File endorsement omitted.]

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,377. U. S. Circuit Court of Appeals, Second Circuit. Term No. 455. Annie G. Phillips, Arthur L. Phillips, Seymour Phillips, and Abraham S. Phillips, executors of the estate of I. L. Phillips, deceased, petitioners, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed September 13, 1930. File No. 35,377.